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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

IVAN S. ANKENBRANDT, as Trustee, etc., Plaintiff and Respondent, v. WILLIAM P. SHANNAHAN, Individually and as Trustee, etc., Defendant and Appellant.	D052576 (Super. Ct. No. GIC872931)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

Ivan S. Ankenbrandt and William P. Shannahan own, as tenants in common, a property located across the street from the ocean in La Jolla, California, improved with a building containing an upstairs apartment and a downstairs apartment (the Property). Ankenbrandt filed this action seeking partition by sale of the Property. Shannahan opposed the action because he preferred partition in kind of the Property, which would enable him to retain the upstairs apartment for himself. The trial court found it was more

equitable to partition the Property by sale, both because an equal division in kind was not feasible and because the value each party would receive were the Property sold would be greater than the value each would receive were it divided in kind and then each portion sold separately. Shannahan appeals the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

The parties acquired the Property in 1970 for $80,000, but it is now worth considerably more because it is located across the street from the ocean in La Jolla, California. The Property contains an upstairs and downstairs unit, each containing two bedrooms and one bathroom. The Property includes a two-car carport.

When they originally purchased the Property, Shannahan (then Ankenbrandt's attorney) instructed the deed be solely in Shannahan's name, and they would use a simple four-paragraph agreement to reflect their shared ownership. The agreement confirmed they were tenants in common in the Property, provided a methodology for sharing the expenses, and contained a buy-out clause. However, when disputes arose in 1974 and Ankenbrandt offered to either buy Shannahan's interest at fair market value or sell his interest to Shannahan at fair market value, Shannahan purported to exercise the buy-out clause, which would have required Ankenbrandt to sell to Shannahan for approximately one-fourth of the fair market value of Ankenbrandt's interest in the Property.

Ankenbrandt threatened litigation unless the matter was resolved and the agreement rescinded. The senior partner at Shannahan's law firm assured Ankenbrandt the problem would be corrected. Shortly thereafter, Shannahan executed and recorded a 1974 grant deed conveying an undivided one-half interest in the Property to both parties. Ankenbrandt understood this resolved the issue and rescinded the original agreement. For several decades, the parties operated the Property consistent with the 1970 agreement having been rescinded.[1]

Since the mid-1970's, rental income (derived almost exclusively from the lower unit) has been distributed to Ankenbrandt. Shannahan's distribution has been in the form of his use of the upper unit, for his own personal use or for a six-year lease to his nephew. The parties have jointly paid all of the expenses.

B. The Partition Action

In 2006, Ankenbrandt filed this action seeking partition of the Property. He alleged partition by sale rather than by physical division would be required. Shannahan's answer denied partition by sale would be required, and alleged partition in kind was available and should be ordered.

In their trial briefs, both parties agreed the Property in its present condition could not be divided in kind. However, Shannahan contended the Property could be converted

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[1] For example, paragraph 3 called for the parties to have a bank account into which the rent for the lower unit would be deposited, and for Shannahan to place a similar amount into the account, and that all of the expenses of the Property would be paid from the account. However, that account was closed no later than the mid-1970's, and the parties thereafter directly paid their shares of the expenses of the Property.

to a two-unit condominium and thereafter divided equally. Ankenbrandt disputed Shannahan's contention.

At trial, Ankenbrandt's real estate appraiser testified the Property's lot size precluded redevelopment for multi-family uses under current zoning regulations, and therefore the highest and best use for the Property would be to redevelop it as a single family residence. If the Property were sold as a single parcel "as is," it would sell for between $2.25 and $2.35 million. If the Property were converted into two condominiums, the upper unit would sell for $875,000 and the lower unit would sell for $825,000.

Ankenbrandt's expert architect testified the building did not meet the criteria for conversion to condominiums established by the City of San Diego. The building was sufficiently dilapidated to be almost condemnable: the chimney showed extreme cracking and potential for collapse; the electrical systems did not comply with current regulations, and the windows, roof and plumbing would have to be replaced. Even if apparently intractable obstacles could be surmounted,[2] the condominium conversion process would take from one to two years.

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2 One significant obstacle to conversion was that two condominiums with two bedrooms would require at least three parking spaces, and there was insufficient land for three parking spaces. Although it was theoretically possible to obtain a variance, Ankenbrandt's expert testified it was highly unlikely and she had never seen a variance granted in a high impact area like the area where the Property was located. Shannahan's expert believed the parking issue could be handled in two ways. First, they could apply for a variance, although Shannahan's expert agreed with Ankenbrandt's expert that it would be "tough" to obtain. Second, they could install a car lift in the carport. However, the cost to install a lift would be between 15,000 and 20,000 (plus between $3500 to

C. The Judgment

The court's interlocutory judgment found sale of the Property would be more equitable than division in kind, and ordered a referee appointed to sell the Property, pay the expenses connected with the sale, and divide the balance equally between Shannahan and Ankenbrandt.

ANALYSIS

A. Governing Legal Principles

The law favors partition in kind, and absent proof to the contrary, the presumption in favor of the physical division of jointly-owned property should prevail. (*Butte Creek Island Ranch v. Crim* (1982) 136 Cal.App.3d 360, 365 (*Butte Creek*).) However, Code of Civil Procedure[3] section 872.820, subdivision (b), provides the court *shall* order the sale of partition property and division of the proceeds if doing so would be "more equitable" than a physical division of the property.

Section 872.820, enacted in 1976, is a change to the former law. "The former sections provided for division by sale only where physical division would cause 'great prejudice' to the parties. The new provisions provide for a presumption in favor of physical division which will control in the absence of proof that under the circumstances sale would be 'more equitable' than division. In proposing this change the Law Revision

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$4000 for the lift itself), and Shannahan's expert conceded he had never obtained approval for an application that used a lift to satisfy the parking requirements.

3 All statutory references are to the Code of Civil Procedure.

Commission explained that the presumption in favor of physical division should continue but that '[i]n many modern transactions, sale of the property is preferable to physical division since the value of the divided parcels frequently will not equal the value of the whole parcel before division. Moreover, physical division may be impossible due to zoning restrictions or may be highly impractical, particularly in the case of urban property. [¶] The Commission recommends that partition by physical division be required unless sale would be 'more equitable.' This new standard would in effect preserve the traditional preference for physical division while broadening the use of partition by sale. [Citation.]" (*Butte Creek, supra,* 136 Cal.App.3d at p. 365.)

The court may weigh two types of evidence when assessing whether partition by sale is more equitable than partition in kind. First, a court should evaluate whether the property is susceptible to division into parcels of roughly equal value, so differences in value could be balanced by way of compensatory payments. (*Butte Creek, supra,* 136 Cal.App.3d at p. 366.) Encompassed within the "susceptibility" determination is whether partition in kind is permissible under applicable subdivision laws. (§ 872.040.)[4] A

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4 Thus, a court ordering partition must consider not only the relative value of the divided property, but also the state and local laws governing the division of land. Indeed, after reviewing the partition laws, the California Attorney General concluded, "Where a court orders the physical division of real property in a partition action, the division must comply with the requirements of the Subdivision Map Act, local ordinances adopted thereunder, zoning ordinances, and the general plan for the area in which the property is located." (64 Ops. Cal.Atty.Gen. 762 (1981).) " 'Opinions of the Attorney General, while not binding, are entitled to great weight. [Citations.] In the absence of controlling authority, these opinions are persuasive "since the Legislature is presumed to be cognizant of that construction of the statute." [Citation.]' " (*California Assn. of Psychology Providers v Rank* (1990) 51 Cal.3d 1, 17.)

second consideration is whether division of the property would substantially diminish the value of each party's interest, and this "is a purely economic test." (*Butte Creek, supra,* 136 Cal.App.3d at p. 367.)

On appeal, the reviewing court may set aside a judgment of partition only for abuse of discretion. (*Richmond v. Dofflemyer* (1980) 105 Cal.App.3d 745, 758.) Determining whether partition by sale would be more equitable than physical division is a factual question for the trial court, and we will not disturb that determination on appeal where the evidence, even though conflicting, permits the court reasonably to conclude that partition by sale would be more equitable than partition in kind. (See *Romanchek v. Romanchek* (1967) 248 Cal.App.2d 337, 344; *Formosa Corp. v. Rogers* (1951) 108 Cal.App.2d 397, 411-412 [applying abuse of discretion standard under prior law].)

B. Ordering Partition by Sale Was Not an Abuse of Discretion

Shannahan argues the order was an abuse of discretion because Ankenbrandt did not present any evidence partition by sale would be more equitable than division in kind. Even assuming Shannahan may raise this issue,[5] we conclude the evidence supports the judgment. First, there was evidence that division of the Property would substantially diminish the value of each party's interest within the meaning of the "purely economic test" described by *Butte Creek.* (*Butte Creek, supra,* 136 Cal.App.3d at p. 367.) Ankenbrandt's expert testified the Property, if sold as a whole in its *current* condition,

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5 Because Shannahan's opening brief largely ignores the evidence presented by Ankenbrandt, and instead relies almost exclusively on the evidence he submitted at trial to support his claims, we could peremptorily reject his claim that no substantial evidence supported the trial court's finding. (*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96-97.)

would bring at least $425,000 more than if the Property were sold as two separate condominium units. Although Shannahan asserts "it is difficult to conceive" how Ankenbrandt's expert's valuation was credible, the testimony was unrebutted (because Shannahan did not offer contrary expert testimony impeaching the opinion of Ankenbrandt's expert on this point) and the trial court accepted that expert's valuations. Accordingly, substantial evidence supports the conclusion that, even if a physical division of the Property was *possible*, such division would substantially diminish the value of each party's interest in the jointly owned asset.

Moreover, there was substantial evidence from which the court could have concluded the Property was not susceptible to division into parcels of roughly equal value that could be separately owned. First, all parties agreed the Property could not be divided in its current condition. Although Shannahan asserted it could be converted into condominiums and thereafter divided, Ankenbrandt's evidence (which the trial court apparently credited) was that the poor condition of the existing structure, coupled with its location and the absence of adequate space to meet the parking requirements under applicable regulations, made it economically unfeasible (and perhaps even legally improbable) to convert the building into condominiums as a predicate to division in kind. Moreover, even assuming the parties could have successfully navigated the legal and economic impediments to conversion, a partition order could not have resulted in separately owned parcels, because the owner of each separate condominium would have

remained a tenant in common in the underlying fee interest and other common areas of the condominium project. (See, e.g., *White v. Cox* (1971) 17 Cal.App.3d 824, 828-829.)

We conclude substantial evidence supports the finding that partition of the Property by sale was more equitable than partition in kind under both strands of the *Butte Creek* test and the trial court therefore did not abuse its discretion by ordering partition by sale.

C. Ankenbrandt Was Not Barred from Seeking Partition by Sale

Shannahan contended below, and reasserts on appeal, that Ankenbrandt waived his right to partition because of paragraph 4 of their original 1970 agreement. Although similar clauses have been construed as an implied waiver of the right to partition,[6] we conclude the trial court had a substantial basis for rejecting Shannahan's claim that Ankenbrandt waived his right to seek partition.

First, the parties in their Joint Trial Readiness Conference Report did not list, as a legal issue in dispute, whether Ankenbrandt had waived the right to partition. To the contrary, they expressly stipulated Shannahan would "not attempt to enforce the provisions of the original agreement between the parties" regarding the right to acquire

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6 Paragraph 4 of the original 1970 agreement provided that, if one party wished to sell his interest, "he shall notify the other party in writing of his intention to sell. The party not so selling shall have the right to acquire the entire property in his own name by paying the selling owner an amount equal to the total cash that he has contributed to the ownership . . . ." In *Schwartz v. Shapiro* (1964) 229 Cal.App.2d 238, the court concluded, to maintain the enforceability of an analogous "right of first refusal" clause, it was necessary to conclude that such clause waived the right to partition "to the extent that before partition can be had the selling owner must first offer his interest to the co-owner." (*Id*. at p. 253.)

the Property provided in paragraph 4, and Ankenbrandt agreed to withdraw his cause of action alleging a right to rescind the original agreement. Under these circumstances, the court could conclude Shannahan was barred from attempting to interpose paragraph 4 as the basis for precluding partition.

Second, even assuming Shannahan had not stipulated to eliminating paragraph 4 as grounds for relief, the trial court rejected Shannahan's waiver argument by finding that "I think the parties long ago either rescinded or abandoned the initial agreement." There was substantial evidence to support the conclusion the 1974 deed was a novation of or rescinded the original agreement. (*Williams v. Reed* (1952) 113 Cal.App.2d 195, 200 [whether parties accomplished novation by substituting new agreement in extinguishment of old agreement is question of fact]; *Sessions v. Meadows* (1936) 13 Cal.App.2d 748, 751 [whether parties extinguished old agreement through rescission by mutual consent is question of fact].) First, Ankenbrandt testified, when Shannahan first tried to invoke paragraph 4 in the mid-1970's, Ankenbrandt had threatened litigation unless the matter was resolved and the 1970 agreement was rescinded, Shannahan's law partner responded to Ankenbrandt's demand for rescission by assuring him the problem would be corrected, and shortly thereafter Shannahan executed and recorded a grant deed conveying an undivided one-half interest to both parties. Moreover, the parties have continued to operate the Property consistent with the 1970 agreement having been rescinded. The foregoing provided substantial evidence for the conclusion that the original agreement had been rescinded or abandoned and had been replaced by the tenancy-in-common

arrangement reflected by the 1974 grant deed. Because the 1974 tenancy-in-common arrangement contains no similar right of first refusal on which Shannahan may predicate his implied waiver argument, the trial court had substantial evidence to reject his waiver claim.

D. Shannahan's "Indispensable Party" Argument

Shannahan asserts the court erred by permitting the action to proceed to judgment without ordering that Saracia, formerly married to Shannahan but apparently involved in a dissolution proceeding, be joined as an additional defendant. However, Shannahan did not assert misjoinder either by demurrer to the complaint or in his answer. Because an alleged defect as to nonjoinder of parties defendant is waived if not raised by demurrer or answer (*Security-First Nat. Bk. V. Cooper* (1944) 62 Cal.App.2d 653, 664), Shannahan was barred from raising it at trial. (*Ibid*.)

Moreover, Shannahan does not have standing to assert any alleged nonjoinder was prejudicial to him. (See generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 33 et seq., p. 94 et seq. [essential requirement to standing to appeal from error is appellant must be aggrieved by the error].) Although section 872.510 provides a plaintiff shall join as defendants all persons claiming an interest in the property to be partitioned, the effect of failure to join such parties is specified in sections 874.220 and 874.225, which provide that an unjoined party's claim to the property is not affected by the judgment. However, this is not an error on which Shannahan may predicate reversal of the interlocutory

judgment to partition the Property by sale. (See, e.g., *Nichols v. Nichols* (1933) 135 Cal.App. 488, 491; *In re Vanessa Z.* (1994) 23 Cal.App.4th 258, 261.)

DISPOSITION

The judgment is affirmed. Ankenbrandt is entitled to costs on appeal.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.